FOR ARGUMENT

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS

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OPINIONS BELOW

The opinions of the lower courts are adequately referenced in Petitioners' Brief.

JURISDICTION

The jurisdictional statement set forth in Petitioners' Brief is accurate.

QUESTIONS PRESENTED

1. Is a cause of action for damages properly implied pursuant to 28 USC § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Fifth and Fourteenth Amendment due process claims emanating from comprehensive land use and environmental measures enacted pursuant to an interstate compact which allegedly cause adverse economic consequences as applied to petitioners' property?

2. Are TRPA's Governing Body members, who act by virtue of an interstate compact which constitutes a governing body of five (5) members from each state and one federal representative with jurisdiction over portions of two states, immune from damage claims arising from their enactment of Compact-authorized ordinances?

3. Does the Eleventh Amendment provide immunity from suit in federal district court to TRPA, a compact-created governmental entity performing environmental and land use functions in portions of two states with Governing Body voting membership composed of an equal number of representatives from each state?

4. Does TRPA, a bi-state governmental agency created by interstate compact, waive Eleventh Amendment immunity when the Compact creating it terms it a political subdivision of *both* states for limited purposes?

STATUTES INVOLVED

With the exception of 42 USC § 1983, Petitioners' Brief adequately references the pertinent statutes. No issue per-

taining to 42 USC § 1983 was presented prior to certiorari nor is the statute remotely, much less "fairly", comprised within the issues presented prior to the granting of certiorari. As such, no issue pertaining to 42 USC § 1983 is before the Court.

STATEMENT OF THE CASE

In 1968, California and Nevada adopted identical statutes envisioning the creation of a bi-state governmental entity with jurisdiction over the watershed area of the Lake Tahoe Basin, an area encompassing portions of both states. [California Government Code §§ 66800-66801; §§ 277.100-277.200 N.R.S.]. In 1969, Congress conditionally consented to the proposed Compact [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. In 1970, upon joint proclamation of the governors, TRPA was called into existence [§ 277.100 N.R.S.; Compact, Article III(j)].

TRPA was created upon the joint legislative findings of Congress and the legislatures of Nevada and California that: (a) the waters and other resources of the region are threatened with deterioration or degeneration endangering the region's beauty and economy; (b) the region is experiencing problems of resource use and deficiencies of environmental control; and (c) there is a need to balance the region's natural and manmade environment by enhancing governmental effectiveness through TRPA [Article I, Compact]. Created with dual Compact goals of "resource conservation and orderly development" [Article I(c), Compact], TRPA is "to provide for the region as a whole the planning, conservation and resource develop-

ment essential to accommodate a growing population within the region's relatively small area without destroying the environment". *Younger v. County of El Dorado,* 5 Cal.3d 480, 488, 487 P.2d 1193 (1971).

The Compact requires that TRPA adopt a regional plan which must include at least the following elements:

(i) An integrated land use plan for the entire region;

(ii) An integrated transportation plan dealing with all modes of transportation and pertinent facilities;

(iii) A conservation plan for the preservation and management of the scenic and other natural resources of the region;

(iv) A recreation plan for the development, utilization and management of recreational resources within the region; and

(v) A public services and facilities plan [Article V(b), Compact].

Such Regional Plan is required to be formulated and maintained after public hearings and upon due consideration by TRPA's Governing Body of the plans, activities, desires and recommendations of state, local and federal governmental entities and the private sector [last paragraph of Article V(b), Compact]. Enforcement of the adopted plan is imposed on the states, TRPA and local government [Article V(c), Compact].

TRPA is empowered to adopt "all necessary ordinances, rules, regulations and policies to effectuate the adopted Regional Plan" on a broad spectrum of subjects including: water quality, air pollution, watershed protection, flood

plain protection, soil and sedimentation control, waste disposal, zoning, subdivision, grading, and water related developments [Article VI(a), Compact]. Enforcement of adopted ordinances, rules, regulations, and policies is imposed on the states, TRPA and local government [Article VI(b), Compact].

TRPA is empowered to review private development proposals and public works projects of local government [Article VI(k) and (c), Compact]. Public works projects and related programs of the states, however, need only be submitted for advisory TRPA review and the states can construct such projects as they desire [Article VI(d), Compact].

The Compact affords TRPA neither the power to condemn property nor the funding which would be necessary for the exercise of such power nor any procedures for its exercise.

The Compact constitutes a governing body of TRPA. The Governing Body is divided equally between the two states (five from each) plus one appointee of the President of the United States [Article III(a) and §3, Compact]. Each state's Governing Body members are three elected officials of local government and two representatives of state government [Article III(a), Compact].

Although TRPA is authorized to accept grants and subventions and collect fees for its services, the only fixed funding of TRPA is imposed by the Compact on local government within the region. Not more than $150,000.00 is required to be paid to TRPA by local government [Article

VII, Compact].[1] As noted in Petitioners' Briefs herein, the fact that the majority of TRPA's funding is derived from state and federal grants is entirely a matter of their largesse, as the Compact contains no requirement that the states or United States do so. Indeed, the states are expressly freed of any liability for contractual debts of TRPA [Article VII(f), Compact].

Petitioners are the owners of, or have an interest in, real property within the region which is subject to TRPA's jurisdiction [R. 112:1-13; R. 116:26-30].

Pursuant to Compact requirements [Articles V(b) and VI, Compact], TRPA adopted its Regional Plan on December 22, 1971 [R. 112:6 and R. 117:16], and *Land Use Ordinance* on February 10, 1972 [R. 112:26-29]. The Regional Plan classified a portion of petitioners' property "General Forest" and the remainder "Conservation Reserve" [R. 112:29-30; R. 113:1-2; and R. 117:16-17].

Desiring to develop their property inconsistent with TRPA's classifications, petitioners submitted a (self-proclaimed) vague [R. 380] master plan to TRPA which application was denied [R. 372-381].

TRPA *sua sponte* rezoned petitioners' land to Conservation Reserve permitting development in accordance with a comprehensive development proposal ("specific plan") and requested petitioners apply for specific plan approval [R. 380; R. 87; R. 113:11-15; and R. 117:27-118:1].

[1]The validity of these exactions have been uniformly upheld upon local governments' refusals to pay. *Younger v. County of El Dorado, supra; List v. County of Douglas,* 90 Nev. 72, 524 P.2d 1271 (1974).

Rather than submit the specific plan solicited by TRPA, petitioners filed this suit, unilaterally concluding that TRPA's single refusal to approve their master plan forever prohibited any use of land [R. 113:16-19; 118:2-5]. No development application other than the vague master proposal has ever been tendered by petitioners to TRPA [R. 113:24-28; 118:10-13; 108-132].

On April 16, 1973, petitioners filed a complaint in the United States District Court for the Eastern District of California against TRPA, El Dorado County, the States of California and Nevada, the then members of TRPA's Governing Body and TRPA's then Executive Officer [R. 1-28]. The complaint as amended alleges that TRPA's Regional Plan and *Land Use Ordinance* as applied to petitioners' property has rendered the property valueless thereby taking the property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution [R. 108, *et seq.*]. Petitioners seek damages in the sum of $31,899,900.00, and injunctive and declaratory relief [*Id.*]. Jurisdiction of the District Court was invoked pursuant to 28 USC §§ 1331, 1343, and 2201 [*Id.*]. Motions to dismiss were filed by some of the defendants.[2]

Judgment of dismissal was entered by the District Court on December 16, 1975 [R. 634]. It found that although the complaint, under customary pleading rules, would be sufficient to state a cause of action in inverse condemnation, such a cause of action was not available against TRPA by virtue of its lack of condemnation powers [*Id.*]. Ac-

[2]No such motions were filed on behalf of the states due to petitioners' failure to serve process on either.

cordingly, TRPA was dismissed. The District Court dismissed the complaint as to the individual defendants on the grounds that they are immune from liability for damages [*Id.*]. It also dismissed all other defendants [*Id.*].[3]

Petitioners timely appealed. For purposes of oral argument only this case was consolidated with three other cases involving TRPA [A. 3]. On August 5, 1977, the Ninth Circuit Court of Appeals rendered its initial opinion herein [A.P. 25-57]. By that opinion, the Ninth Circuit affirmed the District Court's determination that inverse condemnation and monetary relief are inappropriate against TRPA, that the individual defendants are absolutely immune from actions for damages arising from legislative acts and that all other defendants were appropriately dismissed [*Id.*]. It reversed the District Court, however, on the propriety of declaratory and injunctive relief against TRPA [A.P. 35 and 55], and remanded for factual development of whether the acts of the individual defendants were legislative or executive in nature [A.P. 47-48]. In finding the possibility of monetary relief against the individual defendants, the Court of Appeals deemed it appropriate to extend the "constitutional tort" remedy fashioned by this court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for a party deprived of Fourth Amendment rights to these Fifth and Fourteenth Amendment due process claims.

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[3]Since petitioners do not assert error in the dismissal of other parties defendant (i.e., the states and county), we do not discuss the lower courts' grounds therefor nor do we hereinafter brief the propriety of those dismissals.

TRPA petitioned for rehearing [A. 3]. On December 21, 1977, the Circuit Court withdrew its August 5, 1977, opinion and issued a second opinion in its place [A.P. 1-24]. The second opinion's only pertinent departure from the first opinion is it holds TRPA immune from federal court suit.[4] TRPA's immunity from federal court action was premised on the Eleventh Amendment, an issue which had been briefed and argued in the District Courts and the Court of Appeals in connection with the propriety of federal court suit against the states [A.P. 6-9]. Consistent with its initial opinion regarding the Eleventh Amendment immunity of California and Nevada, the Court of Appeals held that TRPA is also immune from federal court suit pursuant to the Eleventh Amendment. In doing so, it separately relied upon the opinion of this Court in *Petty v. Tennessee Missouri Bridge Commission,* 359 U.S. 275 (1959), and upon the analysis of the Eighth Circuit opinion in *Petty,* 254 F.2d 857 [A.P. 7-8].

Accordingly, the Court of Appeals held that action against TRPA in federal court is proscribed by the Eleventh Amendment and litigants who desire to proceed in federal court rather than state court with claims questioning the actions of TRPA can do so only against officers of TRPA. As to claims against the individual defendants for damages, the Court of Appeals found absolute immunity for actions undertaken within the scope of their

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[4]Three other cases were the subject of the opinions hereinbelow. Consistent with petitioners' briefs, we omit reference to the facts and issues therein and to the lower courts' determinations unique to those cases because the parties in those separate actions did not seek certiorari and all cases were the subject of separate judgments in both District Courts and the Court of Appeals. Supreme Court Rules 21(4) and 23(5).

legislative activities and qualified immunity for their authorized non-legislative acts in accordance with *Wood v. Strickland,* 420 U.S. 308 (1974). Petitioners attack both determinations and respondents attack the extension of *Bivens* to these claims.

ARGUMENT

1. NO ISSUE PERTAINING TO THE CIVIL RIGHTS ACT OF 1871 [42 USC § 1983] IS APPROPRIATELY BEFORE THE COURT. FURTHER, THE LACK OF TRUE ADVERSITY ON THAT ISSUE, SEVERE DOUBT AS TO PROPRIETY OF EXTENDING § 1983 TO ACTIONS AGAINST STATES, AND THE NATURE OF THE COMPACT ENTITY BEFORE THE COURT, ALL COUNSEL THAT THE COURT NOT CONSIDER THE PROPRIETY OF EXTENDING § 1983 HEREIN.

A. The Applicability of § 1983 to This Claim Was Neither an Issue Upon Which Certiorari Was Granted Nor Fairly Comprised Within Such Issues.

In neither the petition nor the respondents' briefs in opposition to the petition nor the reply brief is any issue framed concerning the application of Civil Rights Act of 1871 herein.

To be sure, the complaint below asserted such claims [R. 189 and A. 5-6]. Further, the opinion hereinbelow squarely addressed and rejected the § 1983 claims [A.P. 14-15]. Despite such a clearly presented controversy over the application of § 1983 to these claims, petitioners deemed it appropriate to raise no § 1983 questions herein.

Supreme Court Rule 23.1(c) specifically precludes a litigant from injecting issues not raised before certiorari is granted.

No question of the propriety of applying § 1983 to this claim is "fairly comprised" within the issues tendered to this Court on certiorari [Supreme Court Rule 23.1(c)]. Although four questions are presented by the petition, they can be fairly summarized in two:

(1) The amenability of TRPA to suit in federal court in view of the Eleventh Amendment (and a related contention of waiver of such immunity); and

(2) The scope of immunity of individual TRPA Governing Body members for their acts.

Neither can be cogently urged to fairly comprise § 1983 questions. The application of the Eleventh Amendment to TRPA is couched entirely in terms of the position that compact entities occupy in the union and an analysis of the provisions of the Compact. The entire Eleventh Amendment argument deals with TRPA's amenability to suit in federal court. It does not remotely address the appropriate remedy if TRPA is so amenable.

Nor does the question of the scope of immunity for TRPA's Governing Body members for acts within the scope of their authority comprise § 1983 issues. Questions concerning immunities can, and often do, comprise such issues because such immunities are addressed in the context of § 1983 acts, see e.g., *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), but such is untrue here. The Court of Appeals reached immunity ques-

tions in this case only because of its extension of *Bivens* to these due process claims [A.P. 15-17]. In accordance with the view subsequently sanctioned by this Court in *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895, 911-914 (1978), the Court of Appeals examined such immunities for *Bivens*-type actions by analogy to § 1983 immunity cases [A.P. 17]. Analysis of the metes and bounds of § 1983 (particularly, who is and who is not a "person" thereunder) was completely unnecessary to its assessment of appropriate immunities. Questions regarding the scope of immunity from damage actions simply cannot be said to fairly comprise the propriety of a legal theory of liability rejected by the lower court. cf. *Procunier v. Navarette, supra,* 434 U.S. at 566-567, 55 L.Ed.2d at 34 (dissenting opinion of Chief Justice Burger) and *Namet v. United States,* 373 U.S. 179, 190 (1963).

In *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 278-279 (1977) this court refused to consider whether an extension of § 1983 or an extension of *Bivens* justified a damage action against a public entity where such contention was not briefed prior to certiorari. There, as herein, no need arises to reach out for such a "jurisdictional" question, when the complaint alleges jurisdiction under both § 1331 and § 1343.

Petitioners may not so belatedly insert new issues.

B. Petitioners and Respondents Are Insufficiently Adverse Concerning This § 1983 "Issue" to Warrant Entertaining Same.

As petitioners frame the "issue", the Eleventh Amendment should not be a bar to § 1983 actions. Petitioners'

contention in this regard is predicated on this Court's recent opinion in *Monell v. Department of Social Services of the City of New York,* ..... U.S. ....., 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a local school board is a "person" subject to § 1983 suit. Relying on this Court's holding in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), which allegedly finds an exception to Eleventh Amendment immunity when Congress imposes a duty upon the states necessary to the effectuation of the Fourteenth Amendment, petitioners urge that a similar holding is required for § 1983 actions. Such result would necessarily include a finding that states are subject to § 1983 suit. That this finding would have far reaching effects cannot be gainsaid.[5] That such a finding would be a significant extension of *Monell* is equally clear.[6]

Yet petitioners ask this court to address such a significant issue not only in the context of the lack of any such issue being implicitly (much less squarely) presented on certiorari, but, as petitioners admit,[7] in the absence of the states.

---

[5]See *Mt. Healthy City Board of Education v. Doyle, supra,* 429 U.S. at 278.

[6]The majority and dissenting opinions in *Monell* meticulously avoid any language which could be read as extending to the states. See, e.g., the manner in which the issue before the Court is framed ("local government officials" and "local governments"), *Monell v. New York City Department of Social Services, supra.,* 56 L.Ed.2d 618 and 619. Further, the opinions of both the majority and the dissent specifically restrict the case to "local government units" rather than states. *Id.* 56 L.Ed.2d at 635 n. 54 (majority opinion) and *Id.* 56 L.Ed.2d at 655 n. 4 (dissenting opinion).

[7]See page 4, note 3 and page 7, note 6 of petitioners' brief and pages 10-25 of the petition. Petitioners assert no error as to the dismissal of the states by the Court of Appeals' holdings that the states are immune pursuant to the Eleventh Amendment and did not waive such immunity. The acknowledgment of lack of adversity with the states completely belies petitioners' attempt to insert this "issue".

Insufficient adversity exists between petitioners and these respondents on this "issue". TRPA, like any other entity which is but an agency of the states for limited purposes, lacks the familiarity and the interest in the panoply of state activities necessary to fully present the policy issues and the implications of extending § 1983 suits to the states. We submit it is unwise to undertake examination of such issue until it is squarely presented between adversaries who have a complete stake in the "issue".

C. Even if § 1983 Claims Were Appropriately Before This Court, They Are Improper Against These Respondents.

Section 1 of the Civil Rights Act of 1871 affords a remedy for deprivation of constitutional rights under *color of state law*. The italicized language is not gloss.

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State* or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
>
> 42 USC § 1983 [emphasis supplied].

Consistent with the express language of the statute, the cases uniformly hold that one seeking to state a claim for relief under § 1983 must allege facts supporting the conclusion that his civil rights have been transgressed under color of state law. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150 (1970) and *District of Columbia v. Carter*, 409 U.S. 418 (1973).

Contrary to the express language of the statute, as was expressly held by the Court of Appeals [A.P. 14-15 and 4], TRPA acts under federal rather than state law. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 (9th Cir. 1974) *cert. den.* 420 U.S. 974 (1975). As such, there is no state law aspect incident to the alleged deprivations herein sufficient to afford a § 1983 claim.

Attempts to extend § 1983 claims to those acting under federal rather than state law have been uniformly rejected. *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971) *cert. den.* 405 U.S. 1043; *Sigue v. Texas Gas Transmission Corp.*, 354 F.2d 40 (5th Cir. 1955); cf. *District of Columbia v. Carter, supra*, 409 U.S. 418; *Environmental Defense Fund v. Corp of Engineers*, 325 F.Supp. 728 (D.Ark. 1971); *Danner v. Moore*, 306 F.Supp. 433, 436 (W.D.Pa. 1969); *Stinson v. Finch*, 317 F.Supp. 581 (D.Ga. 1970).

That petitioners complain of acts under color of federal law rather than state law is clear both from the complaint and the Compact. All respondents are pursued for their nexus with TRPA, an entity which receives authority exclusively from, and must act consonant with, the Compact. Article I, § 10, Cl. 3 of the Constitution of the United States; and *Younger v. TRPA*, 516 F.2d 215 *cert. den.* 423 U.S. 868. It is that federal law, the Compact, which requires respondents' adoption and enforcement of plans and ordinances. [Articles V(d) and (c) and VII(a) and (b)].

Petitioners would have TRPA exercising a species of state law by virtue of the fact that the Tahoe Regional

Planning Compact is codified by the two states. To be sure, as petitioners urge, the promulgation of a compact requires legislation by the states. Article I, § 10, Cl. 3 of the Constitution of the United States. However, that the Compact clause does not make such state legislation self-operating but only authorizes same upon "the consent of Congress". As such, the state law which petitioners seek color of is absolutely ineffective until ratified by Congress and thereupon made a law of the United States. *League to Save Lake Tahoe v. TRPA, supra.*

Insofar as petitioners desire *Monell* extended because TRPA is an agency of the states, petitioners cite the very death knell of their argument. So, the majority and dissenting opinions in *Monell* observe that § 1983 suits do not extend to the states. *Monell v. New York City Department of Social Services, supra,* 56 L.Ed.2d at 635 n. 54 and *Id.,* 56 L.Ed.2d at 655 n.4. Further, subsequent to *Monell* this Court rejected an action seeking to extend § 1983 to the states. *Alabama v. Pugh,* ..... U.S. ....., 98 S.Ct. 3057, 57 L.E.2d 1114 (1978).

Petitioners' Civil Rights Act claims are neither before the Court nor substantive.

2. THE COURT OF APPEALS ERRED IN EXTENDING BIVENS TO THIS CONTROVERSY.

The Court of Appeals found that petitioners can maintain an action against the individual defendants for monetary relief. In so finding, it reasoned that *Bivens v. Six Unknown Named Agents of Federal Bureua of Narcotics, supra,* should be extended to these due process claims [A.P. 15-17].

The Court of Appeals' extension of *Bivens* is unsound.[8] Such extension of *Bivens* to cover property interests as distinguished from the personal interests in liberty protected by *Bivens* is an unwarranted extension of that case. Further, *Bivens* is premised on the unavailability or inadequacy of alternative remedies such as injunctive and declaratory relief, a circumstance which does not exist here. In affording a "constitutional tort" remedy for alleged due process violations, the Court of Appeals overlooks the very limitations acknowledged by this Court which counsel caution in creating such a remedy for other than Fourth Amendment claims. *Bivens* should not be extended to the range of interests colorably characterizable as due process claims. Nor should *Bivens* be extended to areas of essentially and historically state activity such as land use. *Bivens* should afford the severe sanction of monetary relief only where a manifest deprivation of a well-defined constitutional right occurs, not, as here, in an area where even this Court has found difficulty in ascertaining where land use regulation ends and Fifth or Fourteenth Amendment taking begins.

A. Since Petitioners Seek the Vindication of Property Rather Than Personal Rights, Bivens Should Not Be Extended to this Case.

In *Bivens v. Six Unknown Named Agents, supra,* this Court found damages an appropriate remedy for the deprivation of personal property by federal agents in the

[8]The propriety of extending *Bivens* to this case is an issue raised prior to the granting of certiorari herein (see, e.g., Brief for Respondents JAMES HENRY and WILLIAM BRINER in Opposition to Petition for Certiorari at pages 3 and 12-15).

course of an unlawful search and seizure. In so holding, this Court viewed damages as an unsurprising remedy in view of its historically consistent protection of *personal* liberties.

> "Historically, damages have been regarded as the ordinary remedy for an invasion of *personal* interests in liberty." *Id.* 403 U.S. at 395, 91 S.Ct. at 2004. [Emphasis added; citations omitted.]

Subsequent authority of this Court emphasizes that the remedy implied in *Bivens* deals with a uniquely personal constitutional right.

> "The court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other *personal* interests were similarly protected by provisions of the Constitution. We do not consider that issue here." *Butz v. Economou, supra,* 57 L.Ed.2d at 903, n. 8. [Emphasis supplied.]

The personal interest of the petitioner in *Bivens* to be free from unlawful searches and seizures is vastly different from the real property interest sought to be vindicated by petitioners herein. Petitioners complain that TRPA's land use regulations so impact petitioners' property as to constitute a *de facto* taking thereof. The interest pursued is not the intrusion into personal privacy of the unlawful search and seizure condemned in *Bivens*.[9] It is that Fifth Amendment regulation of property area where:

> ". . . [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice

[9]Justice Harlan articulates the need to afford such a draconian remedy because "the personal interest protected by the Fourth Amendment are those we attempt to capture by the nation of 'privacy' . . ." 403 U.S. at 408.

> and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* ___ U.S. ___, 57 L.Ed.2d 631, 648 (1978).

Whether examined from the perspective of the fundamental difference between economic and personal interests, articulated by Justice Stewart in *Dandridge v. Williams,* 397 U.S. 471 (1970), or the judicial activism or restraint attendant upon whether the Court deals with "preferred freedoms" initially articulated by Chief Justice Stone in *United States v. Carolene Products Co.,* 304 U.S. 144, n. 4 (1938), this Court's characterization of Biven's interest as "personal" is significant. Legislation affecting economic interests lacks both the judicial definition, see *Penn Central Transportation Co. v. New York City, supra,* and the finality of an accomplished interference with personal interests such as the search and seizure in *Bivens.* A monetary remedy should not be extended to these non-personal interests.

B. The Availability Of The Adequate Remedies Of Declaratory Relief Or Injunction Belies Extending Bivens.

Bivens' extension of damages to remedy a constitutional deprivation depends on the inadequacy of alternative remedies. *Butz v. Economou, supra,* 57 L.Ed.2d 914-915. As noted by Justice Harlan in his concurring opinion in *Bivens:*

> "[I]t is apparent that some form of damages is the only possible remedy for someone in Bevins' alleged

> position . . . assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Id.* 403 U.S. at 409-410.

In contrast, damages are wholly unnecessary to the vindication of petitioners' allegedly infringed rights. Petitioners complain of allegedly excessive land use controls. Declaratory and injunctive relief are at hand to remove the precise constraints of which petitioners complain if, in fact, those constraints exceed constitutional bounds. Unlike the accomplished invasion and the personal property seized, converted, and then, apparently, destroyed in *Bivens*, petitioners retain their property and the ability to utilize it in the manner they desire upon their pursuit of available and appropriate remedies—declaratory and injunctive relief.[10]

Even in *Butz v. Economou, supra*, a case in which the "damages", to the extent that they had been sustained, were irreversible, Justice Rehnquist, joined by the Chief Justice and Justices Stewart and Stevens in dissent, cogently observe that the availability of injunctive relief precludes any extension of *Bivens* relief. This case is even stronger than *Economou*, for here no irreversible "damages" exist and a complete remedy is affordable through declaratory and injunctive relief.

Sound policy considerations equally counsel that a monetary remedy not be implied in the land use/*de facto* taking context. Such considerations stem, in part, from the "chilling effect" such a remedy would cause on govern-

[10]Indeed, petitioners seek declaratory and injunctive relief by their complaint [R. 129-130].

mental officials who may find that, in formulating their land use legislation, they guessed wrong, to their financial ruin, in this difficult area of constitutional law. Of equal importance, such considerations stem from an appraisal of the proper role of the legislature and the judiciary in the conflict of balancing logical and reasoned regional values with Fifth Amendment concerns. Implying a damages remedy in the land use context places the *judiciary* rather than the legislature in the posture of determining what properties are and what properties are not in the public domain without any opportunity for the legislative body to so decide, merely because the legislative body allegedly erred in its exercise of its police powers. Uniform precedent of this Court squarely rejects such judicial intrusion into the legislative sphere; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-8 (1974); and *Bivens* sanctions no such anomaly.

The availability of a meaningful alternative remedy removes the need for the implication of a monetary remedy.

C. The Lack Of Clearly Articulated Standards To Determine Where Regulation Ends And Fifth Amendment Taking Begins And The Fact That Land Use Controversies Are Traditionally State Concerns Counsel Against Extending Bivens.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court examined whether a damage remedy should be implied from 18 U.S.C. § 610 for a corporate stockholder against corporate directors. A unanimous court refused to imply such a remedy, citing *Bivens* for two pertinent principles. First, *Bivens* is

cited for the proposition that a damage remedy should *not* be implied concerning issues "traditionally relegated to state law, in an area basically the concern of the states", *Cort v. Ash, supra,* 422 U.S. at 78.

The controversy at bar is no more. This is the "land use controversy"; the area where this Court has repeatedly counseled judicial caution and restraint from undue interference with the predominately *state* legislative process. *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387-388, and *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 4-8. Land use regulation, as petitioners concede in their briefs,[11] is traditionally a function of local, rather than federal, concern. Land use litigation finds its traditional forum in state, rather than federal court. Even the constitutionally dimensioned "taking issue" historically has been the subject of state court litigation. See, generally, Council on Environmental Quality, Executive Office of the President, *The Taking Issue* (Bosselman, Callies and Banta), July 9, 1973, pp. 138 and viii-xiii. As a matter "traditionally relegated to state law" no new federal damages remedy should be implied herein.

Cort relies on *Bivens* as its only authority for the principle that a federal damages remedy will be implied, as herein pertinent, only premised on a definitive federal right.

> ". . . [I]n those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a *clearly articulated federal right* in the plaintiff [citing *Bivens*] . . . ."

[11]See, e.g., pp. 19-20, Brief of Petitioners and p. 21 of petition.

> *Cort v. Ash, supra,* 422 U.S. at 82 [emphasis supplied].[12]

Can it be said that a clearly articulated constitutional right exists for these petitioners? We think not. Motions to dismiss were granted herein by the District Court. Such supposedly "clearly articulated constitutional right" was affirmed to be *nonexistent* by the Court of Appeals. To be sure, the Fifth and Fourteenth Amendments speak clearly of deprivation of property without due process of law. Putting any flesh on those bare words in the land use context has proved a continuing source of consternation to this Court—indeed to all courts.

Over 50 years ago this Court expressed mystification at the demarcation line between the end of legitimate land use police power prerogatives and the commencement of Fifth Amendment taking.

> "[The demarcation line] which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation." *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387.

This year the lack of a clearly articulated test separating where proper zoning regulation ends and taking begins was reiterated by this Court.

> "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a

[12]Parallel authority is to the same effect. In the context of the immunities of individual governmental officials from § 1983 damage actions, the allegedly transgressed right must be established by "settled, indisputable law"; it must be a "clearly established constitutional right" that is transgressed. *Wood v. Strickland,* 420 U.S. 308, 321, 322 (1975); and *Procunier v. Navarette, supra,* 55 L.Ed.2d at 31. A violation of a "clearly established" constitutional right is also required to avoid the immunity of a governmental official subject to a *Bivens*-type action. *Butz v. Economou, supra,* 57 L.Ed.2d at 910.

problem of considerable difficulty . . . . [T]his Court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons . . . ." *Penn Central Transportation Co. v. City of New York, supra,* 57 L.Ed.2d at 900.[13]

Petitioners lack the "clearly articulated federal right" necessary as a precondition to implication of monetary relief under *Bivens.*

D. Extending Bivens To Constitutional Provisions Other Than The Fourth Amendment, Much Less To The Breadth Of Matters Embraced By "Due Process", Is Improvident.

This Court has not extended *Bivens* beyond the Fourth Amendment. Indeed, in numerous contexts where the imaginative could argue that this Court has implicitly extended *Bivens* to other constitutional claims, consistent disclaimers to the contrary appear.[14]

Justice Harlan, in his concurring opinion in *Bivens,* acknowledges that the implication of a private damages remedy for Fourth Amendment violations does not ineluctably lead to the same private action for other constitutional deprivations.

". . . [T]he appropriateness of money damages may vary with the nature of the personal interest asserted."

[13]See, also, *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962).

[14]E.g., *Mt. Healthy School District v. Doyle, supra,* 429 U.S. at 277; *District of Columbia v. Carter, supra,* 409 U.S. at 432-433; *Butz v. Economou, supra,* n. 8; *Aldinger v. Howard,* 427 U.S. 1, 3 n. 3 (1976).

Bivens, supra, 403 U.S. at 409, n. 9 (concurring opinion of Justice Harlan).

Reflection on the area in which *Bivens* extends a private damages remedy suggests that such remedy is inappropriately extended elsewhere. Fourth Amendment violations have persistently posed remedial dilemmas spanning over half a century's decisions of this Court. *Weeks v. United States,* 232 U.S. 393 (1914); *Wolf v. Colorado,* 338 U.S. 25 (1949); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Stone v. Powell,* 428 U.S. 465 (1976). The very group at which the Fourth Amendment directs its restraint—i.e., law enforcement officials—are, themselves, the ones most likely to perceive Fourth Amendment aims as an unwarranted frustration of justifiable conduct. *Weeks v. United States, supra.* An historically protracted definition of Fourth Amendment rights, difficulty in framing appropriate remedies, and a frustratingly uniform factual pattern of those at whom the Fourth Amendment is directed being the alleged transgressors—all of these elements—frame the historical backdrop of *Bivens.* Absent monetary relief against hostile and, presumably, knowledgeable transgressors, how was the important and judicially well-defined Fourth Amendment right to be vindicated?

No such historical remedial dilemma, no such considered hostility by common actors against the interest sought to be vindicated and no equivalent judicial definition exists for the labyrinth embraced by Fifth and Fourteenth Amendment "due process", much less for such claims in the land use context.

The Court of Appeals thought *Bivens* should extend beyond Fourth to Fifth and Fourteenth Amendment due

process claims because the rights protected by the latter . . . "are as fundamental as those protected by the Fourth Amendment" [A.P. 16]. Certainly the Court of Appeals is right. Certainly *some* rights safeguarded by the broad scope of due process are of equal importance with Fourth Amendment freedoms. But, to agree that *some* concepts which find their judicial expression under the rubric "due process" are as significant as the protected privilege vindicated in *Bivens* does not inexorably afford *Bevins* relief to every claim which by facile pleading can be converted into a due process violation.

This case is the best example of why the "significance of the number of constitutional amendments asserted" should not become a rote formula for magically extending or withholding *Bivens'* relief. The division of the Fifth Amendment in the land use context into two components, the due process *and* the just compensation condemnation clauses, is a creature of recent (and, perhaps, dubious) judicial invention. *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.,* 506 F.2d 467 (9th Cir. 1974), and A.P. 5 and 31. What is clearly insufficient to constitute inverse condemnation for purposes of the just compensation clause now may be (or may not be?) sufficient to allege a due process "deprivation". Where in this uncharted, and seemingly, unchartable, sea is any considered inquiry into: (i) the remedial dilemma underlying the constitutional right; (ii) the hostility to the constitutional right by the same group of transgressors; or (iii) the historically considered explicit judicial definition of the right? There is none and this case affords the basis for none.

Bivens should not be extended to this case.[15]

A recent opinion of the Fifth Circuit Court of Appeals sitting *en banc* declines to extend the *Bivens* remedy to due process claims as a class. *Davis v. Passman,* 571 F.2d 798 (5th Cir. 1978). However, the inapplicability of *Bivens* herein does not require a judicial assessment of either the due process interests meriting *Bivens* protection or whether the breadth and nature of due process claims is such that a private damages remedy therefor is improper or unmanageable.

3. THE INDIVIDUAL RESPONDENTS ARE IMMUNE FROM THIS SUIT.

Consistent with the decisions of this Court finding absolute immunity for legislative acts and corollary authority of this Court proscribing inquiry into legislative motivation, the Court of Appeals held the individual defendants absolutely immune for their legislative acts [A.P. 17-18]. Petitioners attack this holding contending that no more than a qualified immunity should be afforded the individual defendants. Petitioners have an attack without purpose. Even if merely qualified immunity were appropriate for the individual respondents, such immunity insulates them

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[15]Other distinctions, acknowledged in Justice Brennan's majority opinion in *Bivens,* affect this case. First, the lack of interference with governmental fiscal policy (*"federal* fiscal policy") in *Bivens, Id,* 403 U.S. at 396, exists herein. No funds exist to satisfy even a minute fraction of the "damages" sought herein and TRPA would literally suffer "economic abolition" upon levy of execution against its meager resources [Article VII, Compact]. Second, unlike *Bivens* we do deal with acts alleged merely to be in excess of authority rather than an act contrary to express constitutional prohibition. *Id,* 403 U.S. at 396-397. The very essence of petitioners' claim is that TRPA's zoning so exceeds the police power prerogatives delegated to TRPA by the Compact that it is *tantamount to* a *de facto* "taking".

from suit herein for lack of a clearly established constitutional right in petitioners.

A. Absolute Immunity for Legislators is Historically and Precedentially Sound.

Petitioners approach the immunity to which the individual respondents are entitled in reverse. So, because prior opinions of this Court have cited the speech and debate clause as *one* basis for affording absolute immunity to legislators, petitioners erroneously conclude that the speech and debate clause is the *only* basis for so holding. Reasoning backwards, petitioners urge that since TRPA is not Congress, the speech and debate clause cannot be utilized to afford absolute immunity to TRPA Governing Body members.

The flaws in petitioners' analysis are manifest and manifold.

Absolute immunity for legislative acts is not founded solely in the speech and debate clause. As petitioners accurately note, the speech and debate clause and accompanying parliamentary privileges are accorded by the Constitution to *Congress*. Article I, Sections 5 and 6 of the United States Constitution. No such privileges are conveyed by the Constitution to state legislative bodies or state legislators. Yet, as petitioners concede, absolute immunity is appropriate for state legislators. *Doe v. McMillan*, 412 U.S. 306 (1973) and *Tenney v. Brandhove*, 341 U.S. 367 (1951). Absolute immunity for state legislators does not square with the speech and debate clause of the United States Constitution being the fountainhead of legislative absolute immunity.

Nor can the corollary speech and debate immunities contained in state constitutions afford the basis for finding such absolute immunity for state legislators. We deal with alleged deprivations of *federal* constitutional rights. The United States Constitution does not reserve to states authority to transgress, supplant, or modify federal rights. The aim of the Fourteenth Amendment is precisely to the contrary. Petitioners' contention that states have the reserved right to afford immunities as they, in their discretion, deem mete is an assumption of monstrous proportions. A state's ability to legislate away the Bill of Rights, and immunize the monsters who might do so as they go, notwithstanding what one would think is the clear proscription to the contrary of the Fourteenth Amendment, is the scope of petitioners' assumption. Legislative immunity for state legislators has its taproots in common law, separation of powers and the proscription on inquiry into legislative motivation, not in residual state powers.[16]

In *Tenney v. Brandhove, supra,* Justice Frankfurter alludes to these state constitutional provisions as "protecting the privilege," *Id.* 341 U.S. at 375. Manifestly there is no existing absolute immunity privilege to protect if those state constitutions create the privilege. In finding absolute immunity for state legislators, Justice Frankfurter dwells on common law, tracing the privilege to sixteenth century

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[16]Were petitioners accurate in their contention that absolute immunity for state legislative acts depends on state action, these individual respondents would thereby be absolutely immune. California and Nevada state law afford such absolute immunity. §§818.2 and 818.4 California Government Code; *State of California v. Superior Court* (Veta), 12 Cal.3d 237, 244-247 (1974); *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508 (1975) *cert. den.* 425 U.S. 904; 41.0307 and 41.032 N.R.S.

authority, *Id.* 341 U.S. at 372, protecting against inquiry into legislative motivation, *Id.*, 341 U.S. at 377, and the broad principle of legislative freedom, *Id.* 341 U.S. at 372-376.

The recent decisions of this Court focus on the nature of the immunity afforded by common law rather than rote citation of the speech and debate clause. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 35 (dissenting opinion of Justice Stevens) and *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976).

It is undoubtedly true, as petitioners suggest, that the principles underlying the speech and debate clause are part of the basis for absolute legislative immunity. The values that inhere in unfettered speech and debate are attributes of government not merely federal privileges. Open, frank, even disputatious legislative processes are not attributes of Congressional privilege, they are elements essential at all levels of government.

The common law and separation of powers principles articulated by Justice Frankfurter in *Tenney v. Brandhove, supra,* equally absolutely immunize the individual respondents for their legislative acts.

This Court has heretofore held that absolute immunity for legislative acts extends beyond state and federal legislators. *Doe v. McMillan, supra,* 412 U.S. at 324, n. 15, finds District of Columbia officials were "acting within the scope of their authority under applicable law and, as a result, were immune from suit." Accordingly, petitioners' argument that this Court has never countenanced the extension

of absolute immunity beyond state and national legislators is simply wrong.

Equally fallacious is petitioners' contention that recent decisions of this Court preclude absolute immunity for these individual defendants. *Wood v. Strickland, supra,* acknowledges that local school board members possess both legislative and executive powers. *Id.* 420 U.S. at 319. Nonetheless, the finding of qualified rather than absolute immunity is restricted to "the specific context of school discipline" an administrative, rather than legislative, function. *Id.* 420 U.S. at 322. Not only does *Wood* restrict its holding to non-legislative functions, it expressly acknowledges the continuing vitality of absolute immunity for legislators. *Id.* 420 U.S. at 317. Although *Scheuer v. Rhodes,* 416 U.S. 232 (1974), affords only a qualified immunity for executive acts, it is equally emphatic in its reiteration of absolute immunity for legislative acts. *Id.* 416 U.S. at 240. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 30, reiterates the rule: "Legislators, judges and prosecutors have been held absolutely immune."

Petitioners can cite no more than cases holding that qualified immunity exists for executive acts. All of the recent authority of this Court deals with non-legislative activity. Petitioners' protestations to the contrary are simply wrong.

Equally underlying absolute immunity for legislators are basic principles of separation of powers. *Tenney v. Brandhove, supra,* 341 U.S. at 372-376; cf. dissenting opinion of Justice Rehnquist in *Doe v. McMillan, supra,* 412 U.S. at 340. Again, such concept is not properly garreted

as solely a Congressional privilege. Judicial deference to legislative enactments, an attribute of separation of powers, extends to all legislative levels. *Euclid v. Ambler Realty Co., supra; Belle Terre v. Boraas, supra,* and *Berman v. Parker,* 348 U.S. 26, 33 (1954). It is not consonant with separation of powers to evince judicial deference to legislative judgments but mulct legislators in damages should the Court disagree with the legislative judgment.

Another aspect of absolute legislative immunity noted in *Tenney* is the necessity of judicial inquiry into legislative motivation should a lesser standard of immunity exist.

> "The claim of an unworthy purpose does not destroy the [legislative] privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of the judgment against them based on a jury's speculation as to motives. The holding of this court in *Fletcher v. Peck* (US) 6 Cranch 87, 130, 3 L.Ed. 162, 176, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."
>
> *Id.* 341 U.S. at 377.

Recent decisions of this Court are in accord.

> ". . . [I]t is not consonant with our scheme of government to inquire into the motives of legislators."
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> *Doe v. McMillan, supra,* 412 U.S. at 340 (concurring opinion of Justice Blackmun); cf. *Wood v. Strickland, supra,* 412 U.S. at 317.

Avoiding inquiry into legislative motivation stems from the very earliest decisions of this Court. See the cases collected by Justice Brandeis for the Court in *Arizona v. California,* 283 U.S. 423, 455 (1931) and *Fletcher v. Peck, supra,* 3 L.Ed. at 176.

One simply cannot square the impropriety of inquiry into legislative motivation with petitioners' proposed standard of qualified immunity for TRPA members. Examination of motivation is a necessary inquiry to determine entitlement to the qualified privilege. See, e.g., *Wood v. Strickland, supra,* 420 U.S. at 322. How does one ascertain the "malicious intention", which is one aspect of denying qualified immunity, without express inquiry into legislative motivation?

Further, assuming the court is willing to depart from the established proscription on judicial inquiry into legislative motivation, what is to be gained? What is to be gained, undoubtedly, is testimony that there were as many separate motives underlying the legislative act as there were legislators involved. It requires incredible naivete to assume that a uniform and monolithic motive actuates any two legislators (much less, as in the case of TRPA, eleven) or to assume that a single or overriding motivation is discernible.

> "The search for legislative purpose is often elusive enough, without a requirement that primacy be ascertained. Legislation is frequently multipurposed; the removal of even a 'subordinate' purpose may shift altogether the consensus of the legislative judgment supporting the statute."
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> *McGinnis v. Royster,* 410 U.S. 263, 276-277 (1970) [citations omitted]

The absurdity of such an inquiry into legislative motivation as would be required by a holding of qualified immunity is manifest. What of the circumstance of two of the eleven legislators being actuated by malevolence while the other nine have pure motivations? Are two of the legislators to be held and the other nine escape without liability despite the objective effect of the legislation being the same? Or, are the nine to be mulcted because two of their colleagues entertained bad thoughts? Further, what of the malevolent legislator who zones a property "casino"? Is the economic windfall derived by the property owner from the advantageous zoning disregarded because a legislator had a "bad" motive? The utter folly of affording only qualified immunity to legislators and indulging in a motive witchhunt was long ago perceived by this Court as an improper judicial exercise. *Tenney v. Brandhove, supra,* and *Fletcher v. Peck, supra.* Coordinate state authority is to the same effect.

> ". . . [The] motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. . . ."
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> *McCarthy v. City of Manhattan Beach*
> 41 Cal.2d 879 (1953)

Absolute immunity for the legislative acts of TRPA members is equally essential for the conduct of public business. The Compact is designed to deal with environmental and land use problems not subject to the control of either of the constituent states. *Younger v. County of El Dorado,*

supra, 5 Cal.3d at 488 and 494-495. The legislative compromises evident in the Compact and the ambivalence of the Compact goals of conservation and orderly growth [Compact, Article I], underscore the recognition of the competing interests which are entrusted to the TRPA governing body members to balance. That second guessing of those judgments would occur through litigation was inevitable.[17] Environmental preservation and land use regulation, areas in which state and local government had so utterly failed that the unusual solution of a compact was resorted to in order to strike a balance, are not areas of facile judgments and ready accord. Areas of such sharp and prolonged policy disagreement and legal difficulty [*Penn Central, supra,* 57 L.Ed.2d at 900] are particularly appropriate for absolute immunity.

Equally counseling that absolute immunity is essential for TRPA members' legislative acts is the position they occupy by virtue of the Compact. This Court is presently confronted by the states' united disclaimers of any fraternity with or economic responsibility for TRPA. This Court also examines an entity having mandatory financing of but $150,000.00, a pittance as against the $30,000,000.00 in damages sought by these Petitioners. It is not just that the joint state legislative and Congressional findings of the need for TRPA are threatened with economic abolition by an award of monetary relief in this case. The individual respondents are being pursued for doing what the Compact

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[17]Repeated attacks asserting that TRPA has erred in favor of overdevelopment at the expense of conservation are numerous. See, e.g., *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974) cert. den. 420 U.S. 974 and *Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 368.

requires: stronger legislation concerning land use and the environment, Compact, Article I; *Younger v. County of El Dorado, supra*, ns. 1, 2, 3 and 16; 115 Cong. Rec. 33068-33069. Further, it must be recognized that these individual Governing Body members stand alone.[18] Indemnification of these Governing Body members by an underfunded entity like TRPA is meaningless. The specter of monetary relief against individual legislators standing alone should afford an absolute immunity under the threat of public business literally breaking down.

The policies underlying legislative immunity do not depend on whether the legislator occupies a local, state or national position.

This Court's recent opinion in *Butz v. Economou, supra*, recognizes the futility of affording immunity based on the level of the actor rather than the type of activity. In holding that federal executive officers were entitled to no greater immunity than their state and local counterparts, this Court observed:

> ". . . [T]here should not be 'one law for Athens and another for Rome.'
>
> • • •
>
> "The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers."

[18]Cf. *Monell v. New York City Dept. of Social Services, supra*, 56 L.Ed. at 649, n. 9 (concurring opinion of Justice Powell) and 56 L.Ed. at 652 (dissenting opinion of Justice Rehnquist).

Id. at 57 L.Ed.2d at 911-912 and n. 25 [citations omitted; emphasis by the Court]. The quoted language articulates the reasons why federal executive personnel should enjoy no greater than qualified immunity as do their state counterparts. Nonetheless, the reasoning in reverse is equally applicable. No reason appears for affording absolute immunity to state and federal legislators but not *interstate* legislators. Nor can any such distinction be justified, as petitioners would have it, based upon the *gravity* of the decisions reached.[19] State and federal legislators have absolute immunity irrespective of the relative unimportance of the subject matter of legislation. They have it not because of the exalted office that they hold nor the significance of the issues with which they deal, they have it merely because they perform the legislative tasks. It is immunity precisely for those legislative tasks, unsolvable by the states singly, that is sought for these interstate legislators.

B. Qualified Immunity Insulates the Individual Defendants from Liability Herein.

While Respondents submit that absolute immunity is appropriate for legislative acts, even petitioners' contention that only qualified immunity is appropriate does not change the result in this case.

The scope of qualified immunity as articulated by this Court in *Wood v. Strickland, supra*, 420 U.S. at 322, is whether the offending governmental official knew or reasonably should have known that the action taken would violate the constitutional rights of the affected party. Both *Wood*

[19]*Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1948) (Learned Hand, J.)

v. Strickland and subsequent decisions of this Court in the area of qualified immunity have consistently held that the constitutional right in question must be a clearly established constitutional right in order to avoid immunity. So, the majority opinion in *Wood v. Strickland* refers to violations of "settled, indisputable law" [*Id.* 420 U.S. at 321], "basic, unquestioned constitutional rights" [*Id.* at 322], and "clearly established constitutional rights" [*Id.* at 322].

Subsequently, in *Procunier v. Navarette, supra,* this Court upheld summary judgment in favor of state executive officers on the basis of qualified immunity on the grounds that the alleged constitutional right infringed was not "clearly established at the time of their challenged conduct" [*Id.* 55 L.Ed.2d at 31].

It cannot be earnestly urged that eleven lay governing body members of TRPA in 1971 knew or reasonably should have known the point at which their comprehensive land use regulation becomes a taking pursuant to the Fifth Amendment. Even the most recent decision of this Court acknowledges the difficulty in divining where regulation ends and taking begins. *Penn Central Transportation Co. v. City of New York, supra,* 57 L.Ed.2d at 900 and *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387 and see, generally, the discussion at pages 23-24 hereof. In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) the demarcation line between regulation and taking was "set" at:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

With all deference, the "too far test" hardly illuminates. The thorny issues presented by the collision of legitimate governmental interests in the community planning and development with those secured by the Fifth Amendment to property owners cannot be minimized. The continued unsettled state of the law in this area makes it absolutely unthinkable to hold individual legislators liable for the taking of property by their authorized promulgation of a comprehensive land use measure on the premise that they knew or reasonably should have known that same might happen to transgress the Fifth Amendment right of somebody affecting a parcel of property somewhere in the Lake Tahoe Basin.

That the demarcation line between governmental regulation and taking is not a clearly established constitutional right is clear from the judicial resolution of this case below: dismissal by the district courts and affirmance by the Court of Appeals on that issue.

To suggest that eleven lay legislators must predict at their peril what the future course of constitutional law may be in this difficult area is nonsense. This Court has repeatedly reiterated that even qualified immunity does not require a governmental official to engage in the vicissitudes of predicting the future course of constitutional law. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 31. Further, there is extreme "hazard of even informed prophecy as to what are 'unquestioned constitutional rights,'" *Wood v. Strickland,* 420 U.S. at 329 (dissent).

The lack of a clearly articulated right in this context precludes liability even under the rubric of qualified immunity.

4. ELEVENTH AMENDMENT IMMUNITY WAS APPROPRIATELY AFFORDED TRPA.

Relying upon this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 375 (1959), and the rationale of the Eighth Circuit Court of Appeals in its opinion in *Petty* [254 F.2d 857], the Court of Appeals held TRPA immune from suit pursuant to the Eleventh Amendment [A.P. 6-9].

Petitioners attack this holding[20] on the basis that compact entities should not be afforded Eleventh Amendment immunity as a class and that, if the nature of TRPA is analyzed, Eleventh Amendment immunity should not apply to it. We submit that petitioners err on both counts. Although petitioners devote the majority of their brief to attacking the finding of Eleventh Amendment immunity, they are unable to cite any persuasive authority in which the identical result was not reached. So, with the exception of one district court opinion, Eleventh Amendment immunity has uniformly been found for compact entities. *Petty v. Tennessee-Missouri Bridge Commission, supra; Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2nd Cir. 1977); *Howell v. Port Authority,* 34 F.Supp. 797 (D.N.J. 1940);

[20]Although framed as an issue in the Petition for Certiorari we are not convinced that the propriety of Eleventh Amendment immunity is appropriately before the Court. Petitioners did not serve process on the states and disclaim any adversity to the states (Petitioners' Brief ns. 3 and 6). Yet, Petitioners urge that only states (and their agencies) enjoy Eleventh Amendment immunity and only a state may waive its own Eleventh Amendment immunity. It is unclear how Eleventh Amendment immunity and a sovereign's own waiver of that immunity can be here when, as Petitioners would have it, that party is not here. It is equally unclear how Petitioners can argue that the opinion below erred in finding no waiver of immunity as to TRPA, but did not err in relying on the same provision of the Compact in finding no waiver by the states.

Rao v. Port Authority, 122 F.Supp. 595 (E.D.N.Y. 1954); and the opinion of the Eighth Circuit Court of Appeal in *Petty* [254 F.2d 587].[21]

Petitioners' assertion that Eleventh Amendment immunity should be decided on a case-by-case analysis of the nature of the compact entity ignores the position that compact entities occupy. The compact clause has its genesis in the fear of an aggregation of state power threatening the Union. *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893); *Dyer v. Sims,* 341 U.S. 22, 27 (1951). The means devised to deal with such potential aggregation of state power is the requirement in the compact clause of Congressional approval of proposed compacts. *Id.* By definition, compact entities sit astride two or more states and deal with matters interstate in nature. All of these considerations suggest that compact entities occupy a position of aggregate state authority warranting Eleventh Amendment immunity.

If, as petitioners suggest, compacts and their offspring are not subject to the penumbra of the states' Eleventh Amendment immunity from suit in federal court, strong disincentives are imposed upon the states from attempting to deal with problems that they share with adjacent states through the compact device. Petitioners' argument suggests that the states surrender their control upon entering into compacts. So, petitioners invoke federal court jurisdiction against the compact entity in derogation of the

[21]The only case at odds with this line of authority extending Eleventh Amendment immunity to compact entities is *Byram River v. Village of Port Chester,* 394 F.Supp. 618 (S.D.N.Y. 1975). The author of this opinion was, however, reversed on the identical issue in *Trotman, supra.*

states' Eleventh Amendment rights to adjudication in state court. If Petitioners' analysis is followed through, states have the perilous choice of either ignoring their interstate conflicts or being subjected to the panoply of federal impositions rather than familiar state rules (e.g., the Federal Administrative Procedures Act, National Environmental Policy Act, and a host of related federal laws and regulations impairing the very envisioned functioning of the compact entity). Recognition of the aggregation of state authority that compacts are, warrants Eleventh Amendment immunity.

Petitioners urge that this Court in *Petty* did not reach the question of the applicability of the Eleventh Amendment to that compact agency. The three dissenting justices in *Petty* did not so read the majority opinion. Justice Frankfurter, joined by two other justices in dissent, concurred in what they understood to be "the court's acknowledg[ment], of the applicability of the provisions of the Eleventh Amendment to Tennessee-Missouri Bridge Commission", *Id.,* 359 U.S. at 283. The concurring opinion obviously understood the "majority" opinion in *Petty* to afford such immunity to the compact entity, for the concurring justices' only reservation was that they would not reach the issue of whether such immunity appropriately extends to compact entities. The lead opinion of Justice Douglas does use the word "arguendo" before the recitation of such immunity. The remainder of the sentence reads:

> ". . . [T]his suit *must be* considered as one against the states since this bi-state corporation *is* a joint or common agency of Tennessee and Missouri."
>
> *Id.* 359 U.S. at 279 [emphasis supplied]

Stronger language can hardly be envisioned for the Court having found Eleventh Amendment immunity.

Petitioners, joined by the states (who, understandably, do not wish their treasuries put at risk), urge the traditional analysis of this compact entity as a court might construe state agencies as distinguished from political subdivisions thereof, yields the ineluctable conclusion that TRPA is insufficiently "state" to enjoy Eleventh Amendment immunity. For the reasons hereinabove set forth, we disagree that TRPA, or any other compact agency, should be examined for its indicia of "stateness" as counterbalanced by its indicia of "localness" to ascertain Eleventh Amendment immunity. Such approach has appeal because one can find case law indulging in such analysis. We submit, however, that the unique position of compact entities is such that a class exemption should be found for their Eleventh Amendment immunity. Even the weighing processes of petitioners and the states, do not, however, result in TRPA being insufficiently state for Eleventh Amendment immunity purposes.

The Court of Appeals noted that even if it were not bound to find immunity for compact entities as a class, the court "would still find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Commission,* 254 F.2d 857 (8th Cir. 1958)" [A.P. 8].

The Ninth Circuit thus alternatively relies on the very rationale that petitioners and the states insist is indispensable to determine the applicability of the Eleventh Amendment to TRPA. Petitioners are accurate that the

state aspects of TRPA as distinguished from the local aspects of TRPA are not articulated in the opinion. However, this Circuit Court of Appeals has repeatedly been compelled to characterize and recharacterize the nature of the Tahoe Regional Planning Compact and TRPA in a variety of different contexts.[22]

Aside from the teachings of the compact clause that only the states, with the consent of Congress may enter into a compact, this Compact contains unique reservations of state prerogatives. So, there is an express reservation of the right to alter, amend or repeal the Compact [§ 7 thereof]. Further, each state separately reserves the right to withdraw from the Compact. [Article VIII(c), Compact]. The retention of amendment and withdrawal rights in the party states evinces the joint legislative intent that the Compact is designed to be a partnership of the states rather than a matter of local governmental concern. Accordingly, it is that *state* partnership which is capable of dissolution by unilateral action of one state. No comparable authority exists with respect to states dealing with organs of local government.

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[22]*League to Save Lake Tahoe v. TRPA, supra* (507 F.2d 517); *Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. B.J.K. Corp.,* 547 F.2d 1072 (9th Cir. 1977); *California Tahoe Regional Planning Agency v. Jennings,* District of Nevada #78-1160 (presently before the Ninth Circuit); and *People of the State of California v. County of Douglas and TRPA,* United States Court of Appeals, #78-2106 (presently before the Ninth Circuit). Further, there was before the Ninth Circuit for consideration the written opinions of the Supreme Courts of the respective states characterizing the Compact and TRPA. *List v. County of Douglas, supra,* and *Younger v. County of El Dorado, supra.*

Other critical elements of the Compact evince TRPA's state rather than local nature. A majority vote of the members from each state is required for TRPA to take action [Compact, Article III(g); *Younger v. TRPA supra*]. Substantial appointment powers of board members are reserved to each state [Compact, Article III]. Although TRPA's funding is a mixture of contributions from state, local and federal government, the modest amount of optimum required funding from local government is so minimal that it appears to contemplate significant state and federal funding [Compact, Article VII]. Further, even such amount of funding as is required of local government results from state initiated action of Compact adoption. *Younger v. County of El Dorado, supra.*

Petitioners and the states make much of the fact that local government officials comprise part of TRPA's Governing Board and that certain TRPA funding is required from local government. We submit that these factors are not dispositive. The political compromises inherent in the Compact are evident from even a cursory reading thereof. The Compact essentially finds that local government and the states have failed in their land use and environmental measures affecting the region. [Compact, Article I and *Younger v. County of El Dorado, supra,* ns. 1, 2, 3 and 16]. Yet the votes controlling TRPA's Governing Body are a split between state and local representatives. The attempt to enlist a potential partnership in the interests of orderly development and resource conservation between the local representatives and statewide representatives from each state does not alter the fact that TRPA is a state imposed attempt at remedying existing governmental ineffective-

ness. The subjugation of local government regulation to TRPA's regulations [Compact, Article VI(a)] equally demonstrates that TRPA is a "higher" level of government. The Compact further vests TRPA with a mandatory review of local government's proposed public works projects [Compact, Article VI(c)]. Yet, dealing with a coordinate level of government, the states, TRPA has but advisory review over public works projects. [Compact, Article VI(d)].

The key element typically relied upon as determinative in affording Eleventh Amendment immunity is whether the treasuries of the respective states are ultimately accountable for monetary relief against the named defendant. *Trotman v. Palisades Park Commission, supra.* Under California and Nevada law, such indemnification is required by public entities on behalf of their individual officers and employees, *Williams v. Horvath,* 16 Cal.3d 834 (1976) and N.R.S. 41.035(9). The difficulty with the foregoing authority is that it is employed in favor of individuals against the specific governmental entity that they serve. In this case, that would appear to be TRPA. However, that public entity could as well be the states. It is by virtue of the Compact, which Compact was initiated by the states of Nevada and California, that TRPA Governing Body members are required to sit. Since the states require this legislative activity by virtue of their Compact, consistent with the above authority, the states should indemnify the legislators.

Neither petitioners nor the states should derive comfort from the Compact provision that, for limited purposes,

TRPA is deemed a political subdivision of *both* states [Article VI(b), Compact].[33] How TRPA's having a foot in both states makes it but a subdivision of one state is unclear. Certainly, a governmental entity partaking of two states should be afforded immunity at least equal to the immunity afforded a single state.

Petitioners and the states attempt to construe some of TRPA's functions and areas of influence as similar to functions and influences traditionally those of local, rather than state, government. Laboring under their analogy, petitioners and the states desire TRPA stripped of Eleventh Amendment immunity because *some* of its attributes are *traditionally* more local than state.

TRPA, like all compact entities, is designed to deal with specialized problems. Accordingly, its lack of powers and aspects characteristic of *both* the states *and* local government (e.g., taxation, popular election of officials, eminent domain, etc.) is not dispositive. The absence of such attributes restricts the areas within which the compact entity is to act. It does not aid in assessing whether the compact entity is state or local.

Further, the characterization of TRPA's authority as being "local" rather than "state" badly misses the mark. The environmental concerns of air and water pollution which TRPA is required to address are hardly subjects of merely local concern. See, e.g., National Environmental Policy Act, 42 USC §§ 4331 *et seq.;* the Clean Air Act, 42 USC §§ 1857 *et seq.* Even the "traditionally" local govern-

[33]The argument that this Compact provision makes TRPA a political subdivision for *all purposes* is considered *infra* at pages 52-53.

mental function of zoning and land use is no more than tradition. Similar, albeit less comprehensive, functions as the zoning authority of TRPA are performed by state government rather than local government. See, e.g., §§ 30300 *et seq.* California Public Resources Code.

The "local" and "state" labels proffered by petitioners and the states do not illuminate. No authority supports utilizing such characterizations as an *ipse dixit* formula for determining immunity. Moreover, such labels fail to recognize that changing circumstances alter the area of concern.

> ". . . [F]rom time to time what was of local concern, and therefore wisely left to local action, becomes a national concern vindicated through national regulation." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment*, 39 Yale L. J. 684, 724.

And, it was precisely the inability of local government and the impotence of the states acting alone to deal with Tahoe's problems which resulted in a non-local approach through TRPA. *Younger v. County of El Dorado, supra,* 5 Cal.3d at 495, n. 16.

> "The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt, and put into operation solutions for the

> problems besetting the region as a whole." *Id.*, 5 Cal. 3d at 494-495.

TRPA is far more than a local government. *Id.* and *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517, 524 (9th Cir. 1974) cert. den. 420 U.S. 974.

> "The instant Compact deals with much more than mere local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state."
>
> *Id.*

Eleventh Amendment immunity for TRPA is appropriate.

5. THE COMPACT DOES NOT WAIVE TRPA'S ELEVENTH AMENDMENT IMMUNITY

Relying upon the opinion of this Court in *Petty v. Tennessee-Missouri Bridge Commission, supra,* petitioners urge that the Compact waives TRPA's Eleventh Amendment immunity.

Petty found waiver of Eleventh Amendment immunity because the states accepted and acted upon a Congressional condition attached to its ratification of that compact authorizing federal court suit. Said condition provides:

> "That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or *jurisdiction* of the United States or of any *court*, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters or any commerce between the states or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person,

matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof."

63 Stat. 930 [emphasis supplied].

Conspicuously absent from this Compact is any similar Congressional condition of approval. Indeed, the Congressional conditions of approval herein appear to be drafted in specific avoidance of the provisions held to waive Eleventh Amendment immunity in *Petty*. [See §§ 2 through 7 of Public Law 91-148, 83 Stat. 360.]

The absence of the very element relied upon in *Petty* was noted by the Court of Appeals as follows:

"The difference between *Petty* and this case is that in *Petty*, Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that

'[I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.' 359 US at 381-82.

Discussing *Petty* in *Edelman v. Jordan, supra*, the Supreme Court emphasized that

'The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.' 415 US at 672.

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, if there has been a waiver, it must be found in the language of the Compact itself." [A. 11-12; footnotes deleted.]

Petitioners acknowledge that waiver of Eleventh Amendment immunity will be found only where express language or overwhelming implications direct. *Edelman v. Jordan, supra,* 415 U.S. at 673. Nonetheless, and even in the face of Congressional conditions seemingly drafted to avoid the waiver effect of the consent condition in *Petty,* petitioners suggest that waiver lurks somewhere in the Compact.

At oral argument hereinbelow, petitioners urged that the use of the term "federal court" in Article VI(b) waives Eleventh Amendment immunity. That article reads:

"All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The location of this provision in the Compact is revealing. It is placed in the Compact article encaptioned "Agency Powers." Analysis of the eleven paragraphs of that article

reveals that that title is apt. If, indeed, the provision quoted was intended to waive Eleventh Amendment immunity, it is out of context.

That Article VI(b) deals with TRPA authority rather than waiving TRPA immunity is equally apparent from its structure. The first sentence authorizes enforcement of TRPA regulations by TRPA and all pertinent governments. The second and third sentences thereof vest state courts with jurisdiction over such actions and set venue. The paragraph concludes that "for this purpose" TRPA is deemed a subdivision of *both* states. Only after the venue provisions does the fleeting references to federal court appear.

The reference to federal court is not an obtuse waiver of Eleventh Amendment immunity. Rather, it acknowledges that *TRPA* may waive its immunity and commence the enforcement actions contemplated by Article VI(b) in federal court and that actions not subject to Eleventh Amendment immunity can be brought in federal court. *Fitzpatrick v. Bitzer, supra.*

The ambiguous "this purpose" in the last sentence of Article VI(b) most logically refers to the enforcement tenor of the Compact provision. "This purpose" modifies the state court jurisdiction and venue provisions for the enforcement actions envisioned by the Article. It is extremely important that TRPA be a political subdivision of both states for purposes of its enforcement actions, because the bond requirements ancillary to injunctions and mandate proceedings (which are the customary enforcement remedies) vary between the states. Sections 529 and

1058, California Code of Civil Procedure and Rule 65(c), Nevada Rules of Civil Procedure.

Nothing in the Compact waives TRPA's Eleventh Amendment immunity.

CONCLUSION

The controversy surrounding the Tahoe Regional Planning Compact persists. California appears to seek a *de facto* divorce or annulment (see §§ 67000 *et seq.* California Government Code creating the *California* TRPA). Both states want an amended Compact, but have not adopted remotely similar amendments (cf. Cal. Stats. 1976 c. 1329 and Nev. Stats. 1977 p. 1065). Environmentalists sue because TRPA is too generous to orderly growth. *League to Save Lake Tahoe v. TRPA, supra.* Developers, such as petitioners, sue because TRPA is too generous to the environment.

That controversy is the setting. Monetary relief should not be the answer against those who merely err in authorized legislation amid this din. Federal court should not be the forum for untangling such state-imposed dilemmas.

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Respectfully submitted,

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